No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATIONS, INC.

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QUESTIONS PRESENTED

1. Whether a state's blanket prohibition of alcoholic beverage advertising on cable television programming originating outside the state is invalid by operation of the Supremacy Clause, where such prohibition results in a direct conflict with federal law and policy.

2. Whether a state, consistent with the protection of commercial speech under the First and Fourteenth Amendments, may adopt a sweeping ban on truthful, nonmisleading advertising for a lawful product.

3. Whether a state, consistent with the First and Fourteenth Amendments, may prevent cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, nonmisleading advertising for wine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 699 F.2d 490 and appears in the Appendix to the Petition for Certiorari. The two opinions of the United States District Court for the Western District of Oklahoma granting a preliminary injunction and granting a summary judgment are not reported, but both are reprinted in the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. On March 21, 1983, the Court of Appeals denied a Petition for Rehearing filed by Petitioners. PA at 26a.[1] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves Article I, Section 8, Clause 3 and Article VI, Clause 2 and the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; The Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.;* Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3); Sections 76.55(b), 76.57-.61 of the rules of the Federal Communications Commission ("FCC"), 47 C.F.R. §§ 76.55(b), 76.57-.61 (1982); Article 27, Section 5 of the Constitution of the State of Oklahoma; and Section 516 of the Oklahoma Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516.

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[1] References to "PA at _____" are to the Appendix in the Petition for Certiorari, while references to "JA at _____" are to the Joint Appendix.

STATEMENT OF THE CASE

Petitioners operate cable television systems in the State of Oklahoma. Much of Petitioners' cable service is composed of programming that originates outside Oklahoma and is received by Petitioners' systems, by means of a standard off-air antenna, microwave receiver, or satellite dish, and retransmitted by wire to their subscribers. JA at 21-23. In some cases the FCC's so-called "must-carry" rules mandate Petitioners' carriage of signals from out-of-state television stations.[2] Aside from their "must-carry" obligations, cable operators select out-of-state programming voluntarily, and it is this programming which typically furnishes the systems' primary appeal to subscribers. JA at 21-22. Out-of-state programming voluntarily carried by Petitioners includes the signals of commercial television stations located in neighboring Kansas, Missouri and Texas and the signals of so-called "super stations" from such cities as Atlanta and Chicago.[3] This programming occasionally contains wine commercials that are permitted under federal law and in the states where they originate. PA at 4la; JA at 21, 25, 36. Petitioners also provide advertiser-supported national cablecasting program services, such as the Cable News Network (CNN), which also typically include wine commercials. [4]

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[2] JA at 21-23, 34-37. 47 C.F.R. §§ 76.57-.61 (1982).

[3] JA at 21-23, 35-36. A "super station" is an independent television station whose signal is relayed via satellite to cable systems beyond the normal reach of its over-the-air signal.

[4] The FCC's definition of "cablecasting" includes satellite-delivered national cable program services such as CNN, Entertainment Sports and Programming Network (ESPN) and USA Network. 47 C.F.R. § 76.5(v) (1982). *See also United States v. Midwest Video Corp.*, 406 U.S. 649, 653 n.6 (1972) (plurality opinion) ("cablecasting" defined as the transmission of "programs produced by the CATV operator and 'films and tapes produced by others, and CATV network programming' ").

The sale and consumption of alcoholic beverages are lawful in the State of Oklahoma. 699 F.2d at 500; PA at 19a-20a, 42a. By statute, however, the state makes it unlawful "for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.' " Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516.[5] The act specifically defines wine as an alcoholic beverage within the scope of the advertising ban. *Id.* § 506(3). The advertising of beer is permitted.[6]

The Oklahoma Attorney General has construed the liquor advertising ban not to apply to advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, including publications specifically designed for circulation within the state.[7] Out-of-state publications may be delivered to Oklahoma subscribers and sold at outlets within the state even though they contain wine or liquor advertising. 699 F.2d at 493 n.1, 502; PA at 5a, 23a-24a.

For many years, the state applied a similar policy to cable operators, and they were permitted to carry out-of-state cable programming containing wine commercials. 699 F.2d at 492; PA at 4a, 41a. In March 1980, however, the Oklahoma Attorney General issued an opinion stating that retransmission of such wine commercials by cable systems operating in Oklahoma would be considered a violation of state law. *Op. Okla. Att'y Gen.* No. 79-334 (March 19, 1980). Respondent Richard Crisp, Director of the Oklahoma Alcoholic Beverage Control Board, notified all Oklahoma cable operators, including Peti-

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[5] PA at 53a; *see also* Okla. Const. art. 27, § 5.

[6] 699 F.2d at 492, 502; PA at 3a-4a, 23a. The state's definition of alcoholic beverages includes beer containing more than 3.2 percent alcohol by weight. Okla. Stat. Ann. tit. 37, § 506(3). However, because beer advertising does not generally specify alcoholic content, the advertising of beer generally is allowed. 699 F.2d at 492; PA at 3a-4a.

[7] *See, e.g., Op. Okla. Att'y Gen.* No. 76-348 (November 24, 1976).

tioners, that they faced imminent criminal prosecution if they continued to carry the out-of-state wine commercials.[8]

Federal law prohibits cable television operators from altering the content of the television signals, including commercials, that they retransmit to their subscribers. 699 F.2d at 492; PA at 4a, 40a. Section 76.55(b) of the FCC's rules, 47 C.F.R. § 76.55(b) (1982), requires that television programming retransmitted by a cable system "shall be carried in full, without deletion or alteration of any portion." The FCC has specifically held that this regulation forbids the deletion of commercial messages.[9] Moreover, Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3), expressly prohibits Petitioners from willfully deleting a commercial advertisement from a television signal.

Even if the deletion of the out-of-state wine commercials were lawful, there would be, as the District Court found, "no feasible way for [Petitioners] to block out the advertisements." PA at 41a. Petitioners have no contractual relationship with the out-of-state television stations whose signals they carry, no control over the programming included by the stations in those signals, and no advance notice from the stations concerning the scheduling of wine commercials. PA at 40a; JA at 24-26, 37-39. Petitioners' reception and retransmission of the television signals occur simultaneously. JA at 30. As a practical matter, therefore, Petitioners would be unable to delete each wine commercial in its entirety as it appears; to attempt deletion of

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[8] 699 F.2d at 492; PA at 4a, 41a; JA at 11. In Oklahoma, a public official such as Respondent is required to follow the Attorney General's opinion until relieved of the obligation by a court of competent jurisdiction. *See, e.g., Aetna Casualty & Surety Co. v. State Bd. for Property and Casualty Rules*, 637 P.2d 1251, 1254 (Okla. 1981).

[9] *See Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978) ("Section 76.55(b) of the Rules . . . is meant to prohibit advertising deletions as well"); *WAPA-TV Broadcasting Corp.* 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417, 444 (1968).

each wine commercial would require an extremely burdensome, costly effort by Petitioners to monitor each signal continuously.[10]

Petitioners would thus be compelled to discontinue their carriage of all cable programming containing wine commercials received from sources outside Oklahoma. This would deprive Oklahoma residents of access to national cablecasting program services and the programming offered by the "super stations," as well as that provided by less distant stations whose signals are available to Oklahoma residents only by means of cable retransmission. Some Oklahoma towns would receive no television signal at all if cable operators could not import signals from outside the state. JA at 36-37.

Failure to carry out-of-state signals would place some cable operators in violation of the FCC's "must-carry" rules which require them to carry certain out-of-state signals to their subscribers. JA at 21-23, 35-37. Additionally, by preventing the carriage of out-of-state cable programming, Oklahoma's ban on alcoholic beverage advertising would deny cable operators the ability to offer much of their most popular programming. JA at 22, 37. As the District Court found, this would cause the operators a substantial loss in subscriber revenue and in some cases imperil their financial survival. PA at 42a; JA at 22.

District Court Proceedings

After being warned by state officials that they would be prosecuted if they continued to retransmit out-of-state wine commercials, Petitioners brought an action on March 3, 1981, in United States District Court for the Western District of Oklahoma against Respondent Richard Crisp in his official capacity as director of the Oklahoma Alcoholic Beverage Control Board. JA at 7-11. Petitioners sought injunctive relief

[10] PA at 29a; JA at 24-27, 29-31, 36-39. *See also Cable Television Report and Order*, 36 F.C.C.2d 143, 154-56, 165 (1972) (Commission rejects as unworkable its own proposal that would have required some cable systems to delete commercials from certain distant television signals).

against the application of Oklahoma's liquor advertising ban to their carriage of wine commercials and programming containing such commercials and sought a declaratory judgment that such application would, *inter alia*, violate their right to freedom of speech guaranteed by the First and Fourteenth Amendments.[11]

Following an evidentiary hearing on March 6, 1981, the District Court granted a preliminary injunction enjoining Crisp from enforcing the advertising ban against Petitioners' carriage of wine commercials. PA at 28a-30a. On December 18, 1981, the District Court entered summary judgment for Petitioners and issued a permanent injunction. PA at 31a-32a. An opinion supporting the orders was filed by the District Court on February 10, 1982.[12]

The District Court found that the wine commercials carried by Petitioners were not false or misleading and did not advocate unlawful activity and therefore held that they were entitled to First Amendment protection under the decisions of this Court regarding commercial speech. PA at 47a. The District Court ruled that Oklahoma's "blanket suppression" of this advertising violated the First Amendment, relying on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and other decisions of this Court for the proposition that in the area of commercial speech "the State cannot totally prohibit the dissemination of truthful information about a lawful activity." PA at 46a, 49a.

The District Court rejected the contention that Oklahoma's power to regulate liquor under the Twenty-first Amendment superseded the requirements of the First Amendment. *Id.* at 45a-46a. The District Court also found that Oklahoma's

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[11] Petitioners also alleged that enforcement of the liquor advertising ban against them would violate the Commerce and Supremacy Clauses of the United States Constitution, Articles I and VI, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343 and 2201 and 42 U.S.C. § 1983.

[12] PA at 33a-50a. The February 10 opinion replaced an opinion filed with the original orders. As the Tenth Circuit noted, the opinions were "nearly identical." 699 F.2d at 493; PA at 5a.

advertising ban failed to satisfy the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), because it only remotely and ineffectively, if at all, served the state's asserted interests in discouraging alcohol abuse. PA at 48a. The District Court demonstrated that enforcement of the ban against Petitioners would merely prohibit them "from disseminating advertisements of something the public already knows from experience and from reading [out-of-state] newspaper and magazine advertising —that alcoholic beverages exist and are for sale at certain prices." *Id.* at 45a. The District Court also concluded that the ban was contrary to this Court's holding in *Central Hudson* because there existed alternative measures, such as educational programs, to combat alcohol abuse more effectively without infringement on First Amendment interests. Finally, the District Court found that "there exists no feasible way for [cable operators] to block out the advertisements." [13]

The Court of Appeals' Decision

On appeal, the Tenth Circuit reversed, holding that enforcement of Oklahoma's liquor advertising ban against Petitioners did not violate the First Amendment.[14] The Tenth Circuit concurred with the District Court's conclusion that the wine advertisements carried by the cable operators concerned lawful activity, were not false or misleading, and therefore were "protected speech under the First Amendment." 699 F.2d at 500; PA at 20a. Nevertheless, the Tenth Circuit sustained the advertising ban, holding that this result was compelled by the Supreme Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Comm'n*, ____ U.S. ____, 103 S.Ct. 31 (1982), which was decided after the District Court's decision.[15] Although the Tenth Circuit recognized that

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[13] PA at 40a-41a, 48a-49a. The District Court did not reach Petitioners' other constitutional claims. PA at 39a-40a.

[14] Petitioners' other constitutional claims were not addressed by the Tenth Circuit.

[15] *Queensgate* involved an appeal from a decision by the Ohio Supreme Court that sustained the constitutionality of that state's partial ban on off-premises advertising of liquor prices by certain holders of liquor permits. *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, ____ U.S. ____, 103 S.Ct. 31 (1982).

Oklahoma's restrictions "are indeed broader than the regulation in *Queensgate*," 699 F.2d at 497; PA at 15a, it concluded that this Court's dismissal of the *Queensgate* appeal "mandate[d]" reversal of the District Court decision. 699 F.2d at 502; PA at 24a.

In addition to relying on *Queensgate*, the Tenth Circuit held that the Oklahoma ban should be sustained because of "the additional deference owed to the legislature as a result of the Twenty-first Amendment." 699 F.2d at 501; PA at 22a. The Tenth Circuit did not require the state to justify its infringement of First Amendment rights by the stringent standard required by *Central Hudson* and upheld the Oklahoma restrictions after finding them "reasonably related to reducing the sale and consumption of [alcoholic] beverages and their attendant problems," and "no more extensive than is necessary to serve Oklahoma's asserted interest." 699 F.2d at 501-502; PA at 22a, 24a.

Although the court noted that cable television operators were precluded by federal law from deleting out-of-state wine commercials from the cable programming they carry, 699 F.2d at 492; PA at 4a, and that they "especially are placed in a difficult position" by the liquor advertising ban, 699 F.2d at 502; PA at 23a, the court did not explain how the state, consistent with the Supremacy Clause or the First Amendment, could effectively prohibit the carriage of out-of-state cable programming. Nor did the Tenth Circuit indicate how cable programming could be distinguished in this respect from magazines and newspapers which are allowed to be distributed and sold in Oklahoma even though they contain liquor advertisements.

SUMMARY OF ARGUMENT

I

Opinions of this Court hold repeatedly that the Twenty-first Amendment creates only a narrow exception to the Commerce Clause, and does not constrict protections afforded by the First and Fourteenth Amendments. The decision below failed to acknowledge that, under the Twenty-first Amendment, a

state can impose only very limited restrictions on speech without violating the First and Fourteenth Amendments.

II

The federal government has preempted the regulation of cable programming importation. Under the Communications Act and the Copyright Act, cable operators cannot, without violating federal law, delete any portion of imported television programming, or alter it in any other way. Oklahoma's requirement to delete wine advertising therefore would force Oklahoma's cable operators to refrain from carrying any out-of-state television signals, for the commands of federal law cannot be reconciled with those of the state. In certain circumstances, the failure to carry such out-of-state television signals would itself be a violation of federal law. Similarly, deletion of other out-of-state cable programming frustrates federal policy to enlarge the variety of program services available on cable nationwide. Such a drastic curtailment of cable service directly conflicts with the federal policy encouraging carriage of out-of-state cable programming. Therefore, under the Supremacy Clause, Oklahoma's regulation must fall.

III

The Oklahoma scheme also is unconstitutional under the First Amendment. The Tenth Circuit analyzed this case under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and found no constitutional violation; but it failed properly to apply the third and fourth parts of the *Central Hudson* test. Under the third part, restrictions on liquor advertising fail to pass scrutiny because they are so tenuously related to controlling intemperance. Under the fourth part, Oklahoma's failure to rely on less drastic means (including forbidding the importation or sale of alcoholic beverages within the state) dooms the regulations.

The Tenth Circuit's reliance on the *Central Hudson* test is itself in error because the broad sweep of Oklahoma's regulation condemns it on more fundamental First Amendment grounds. Oklahoma's restrictions are in effect a flat ban on importing cable programming and, as a consequence, are a prior restraint of protected cultural, political and commercial

expression. This cannot be justified by Oklahoma's Twenty-first Amendment interest, and violates basic First Amendment principles set down by this Court.

ARGUMENT

I

THE TWENTY-FIRST AMENDMENT DOES NOT JUSTIFY OKLAHOMA'S LIQUOR ADVERTISING BAN AS IT RELATES TO CABLE PROGRAMMING BECAUSE FEDERAL LAW HAS PREEMPTED THE FIELD AND THE BAN VIOLATES PETITIONERS' FIRST AMENDMENT RIGHTS

The Tenth Circuit upheld Oklahoma's ban of liquor advertising in cable programming even though it recognized that such "regulation of commercial speech . . . might not otherwise be permissible." The court believed "that the Supreme Court's summary dismissal in [*Queensgate Investment Co. v. Liquor Control Comm'n*, ____ U.S. ____, 103 S.Ct. 31 (1982)] mandates this result." [16]

The precedential effect of a summary action extends no farther than "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The facts and issues in *Queensgate* bear little resemblance to the facts and issues in this case. In *Queensgate* the holder of a permit to sell liquor by the drink challenged a state regulation that prohibited permit holders from referring to price

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[16] 699 F.2d at 502; PA at 24a. Summary disposition of an appeal by this Court, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits which is binding on lower counts. *See Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975). Summary actions of this Court should not be interpreted by lower courts "as breaking new ground," but rather should be construed "as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. at 176. The precedential effect of such a decision in this Court is limited. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974)(summary dispositions not accorded the full weight of decisions in which the issues were fully explored).

or price advantage in their advertising. Ohio law allowed other forms of advertising by permit holders and permitted manufacturers and distributors of liquor to advertise. In this case, Petitioners are not liquor retailers; rather, they are operators of cable television systems which provide a wide variety of cable programming including news, editorials, documentaries, entertainment and other ideas and information to subscribers in Oklahoma. Moreover, Petitioners' business is the interstate importation of cable programming, whereas the advertising regulated in *Queensgate* was solely intrastate activity of the state's liquor permit holders. The facts of *Queensgate* and of this case thus present constitutional issues that are neither precisely the same nor "substantially similar," as the Tenth Circuit erroneously found. 699 F.2d at 497; PA at 13a.

The Ohio Supreme Court's decision upholding the state's power to regulate limited kinds of intrastate liquor advertising by its own permittees may be unexceptionable. However, the Tenth Circuit's reliance on the summary dismissal in *Queensgate* to uphold Oklahoma's blanket advertising ban on interstate cable programming is directly contrary to this Court's decisions interpreting the relationship between the Twenty-first Amendment and other constitutional provisions.

As a result of its reading of *Queensgate*, the Tenth Circuit found that Oklahoma's "general police power as enhanced by the Twenty-first Amendment" permits its blanket advertising ban. 699 F.2d at 498; PA at 15a. This Court, on the other hand, has consistently held that the Twenty-first Amendment does not save a regulation that otherwise runs afoul of established constitutional principles. The Twenty-first Amendment does not alter the principles of the Establishment Clause of the First Amendment, *Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505, 510 n.5 (1982), the Equal Protection Clause of the Fourteenth Amendment, *Craig v. Boren*, 429 U.S. 190, 209-210 (1976); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-179 (1972), or the Due Process Clause of the Fourteenth Amendment, *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). Nor does the Twenty-first Amendment free the states from restrictions upon the police power imposed by

other constitutional provisions. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980).[17]

In *Craig v. Boren*, 429 U.S. 190 (1976), this Court reviewed the history leading up to the passage of the Twenty-first Amendment and concluded that it "primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 206. Further:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Id. (citation omitted). *A fortiori* the Twenty-first Amendment does not qualify individual rights protected by the Bill of Rights and the Fourteenth Amendment where the *advertising* of liquor is concerned.

The Court in *Craig v. Boren* held that the Twenty-first Amendment "does not alter the application of equal protection standards that otherwise govern this case," *Id.* at 209, and invalidated an Oklahoma statute that prohibited the sale of liquor to females under 18 and males under 21 on the ground that it violated those standards. Because freedom of speech is the touchstone of individual liberty, *see, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), the Twenty-first Amendment similarly cannot alter the application of First

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[17] In *Midcal* this Court restated its position that the Twenty-first Amendment is not beyond the reach of the federal commerce power when the state's regulation "squarely conflicts" with regulations imposed by Congress. *Id.* at 109 n.11. *See also Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, ____ U.S. ____, 102 S.Ct. 3014, 3022 (1982) (standard preemption principles not inapplicable merely because an area of special concern to the state is involved); *Grendel's Den, Inc. v. Goodwin*, 495 F.Supp. 761, 764 (D. Mass 1980), *aff'd*, 662 F.2d 102 (1st Cir. 1981) (en banc), *aff'd sub nom. Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505 (1982).

Amendment standards that otherwise govern this case. *Cf. Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505, 510 n.5 (1982).

This Court's decisions in *California v. LaRue*, 409 U.S. 109 (1972) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981)(per curiam), relied on by the Tenth Circuit, both involved the same type of factual setting—the state's regulation of entities it licenses to sell and distribute liquor within its borders. The state regulations upheld in those cases were designed to control the times, places and circumstances under which liquor was sold and, incidentally, imposed limited restrictions on protected expression. *See Bellanca*, 452 U.S. at 715; *LaRue*, 409 U.S. at 114, 117 & n.4. The Court in *LaRue*, however, specifically noted that its decisions "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.* at 115. In *Bellanca* the Court simply applied standards announced in *LaRue* to uphold a New York regulation banning topless dancing in an establishment licensed by the state to serve liquor. *See Bellanca*, 452 U.S. at 717.

Neither *LaRue* nor *Bellanca* dealt with a blanket suppression of protected speech like the Oklahoma advertising ban in this case. The Supreme Court considered this a "critical fact" that permitted the state to impinge incidentally upon constitutionally protected activities. *See LaRue*, 409 U.S. at 118; *Bellanca*, 452 U.S. at 716. When a state's liquor regulation has imposed a blanket ban on protected speech or conduct, as in this case, this Court has not hesitated to strike down the regulation, notwithstanding the Twenty-first Amendment.[18]

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), this Court held that the

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[18] *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975). *Doran* involved a First Amendment challenge to a local ordinance which prohibited females from appearing topless not just in bars but in any public place. The Supreme Court agreed with the lower court that the ordinance was far broader than necessary to protect the state's interests. *Id. See New York State Liquor Authority v. Bellanca*, 452 U.S. at 716-717.

Twenty-first Amendment does not bar application of the Sherman Act to California's wine pricing system. The Court found that California failed to sustain the burden of showing that promoting temperance and protecting small retailers were more substantial interests than the national policy favoring competition. Similarly in this case, the District Court found that Oklahoma's blanket advertising ban, when applied to cable programming, served the state's interest in promoting temperance only remotely and ineffectively, if at all.

Under this Court's decision in *Midcal*, the effectiveness of the advertising regulation in advancing Oklahoma's interest must be weighed against its impact on national policy favoring a nationwide communications system and its infringement of Petitioners' First Amendment rights.[19] The Tenth Circuit failed to measure Oklahoma's regulation by that test. Contrary to the Tenth Circuit's decision, the Twenty-first Amendment does not alter the application of constitutional standards under the Supremacy and Commerce clauses and the First Amendment that otherwise govern this case.

II

FEDERAL LAW PREEMPTS THE REGULATION OF CABLE TELEVISION PROGRAMMING AND OKLAHOMA'S REGULATION OF CABLE TELEVISION ADVERTISING IS INVALID UNDER THE SUPREMACY CLAUSE

The Court has directed the Parties to brief and argue the question "[w]hether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting." ____ U.S. ____ (No. 82-1795) (October 3, 1983).[20] Oklahoma's regu-

[19] "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" *Midcal*, 445 U.S. at 110; *see also Craig v. Boren*, 429 U.S. 190, 206 (1976).

[20] "Cable broadcasting" includes, at a minimum, the video programming generally carried by cable systems throughout the country. This programming includes both television signals and other signals such as satellite-delivered national cablecasting program services. *See supra* note 4.

lation of alcoholic beverage advertising, as applied to cable programming, conflicts with federal statutes and regulations and stands as an obstacle to federal policy objectives established by Congress pursuant to powers granted by the Commerce Clause and implemented by the FCC. The Supremacy Clause mandates that federal law preempts Oklahoma's liquor advertising prohibition and renders it invalid as applied to cable television programming.[21]

A. Federal Law Regulates Cable Programming

1. The Communications Act and FCC Policy and Regulations

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), this Court construed the broad statutory grant of authority contained in the Communications Act [22] as conferring on the FCC the power to regulate cable television. In *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17, 662 n.21 (1972) (plurality opinion), the Court, following *Southwestern*, confirmed the FCC's authority to regulate both cable retransmission of television signals and cablecasting.[23]

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[21] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 n.11, 110 (1980).

[22] The Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Act"), created the FCC for the purpose of regulating "communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service . . . ." 47 U.S.C. § 151. Under § 2(a) of the Act, Congress directed the FCC to regulate all interstate and foreign communication by wire or radio. 47 U.S.C. § 152(a). Moreover, Congress empowered the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Thus, Congress gave the FCC broad authority "to maintain, through appropriate administrative control, [the federal government's] grip on the dynamic aspects of radio transmission." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting, F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[23] These holdings have been reaffirmed in subsequent cases. *See, e.g., F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

In fulfilling its role as the " 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,' " *Southwestern*, 392 U.S. 157, 168 (1968), the Commission has "adopted a subject-matter approach to the allocation of regulatory responsibility over cable television" and has preempted areas of cable regulation "to assure the orderly development of this new technology into the national communications structure." *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975). The "ultimate dividing line" between federal and state regulation of cable television operations "rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications." *Id.* at 861. The Commission allocates primary regulatory responsibility for the former area to the states and their political subdivisions, while reserving the latter for its own regulation. *Id.*

In exercising jurisdiction over the operational aspects of cable communications, the Commission preempts state regulation of television signals carried by cable television companies. "The fact that this Commission has preempted jurisdiction of any and all signal carriage regulation is unquestioned. . . . Franchising authorities do not have any jurisdiction or authority relating to signal carriage." [24] The Commission's preemption of state and local regulation of cablecasting is equally unambiguous. *Community Cable TV, Inc.*, ____ F.C.C.2d ____, FCC 83-525, slip op. at 9-13 (Nov. 15, 1983) ("[T]he Commission has deliberately preempted state regulation of non-basic program offerings, both non-broadcast programs and broadcast programs delivered to distant markets by satellite."); *see also First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 201, 205, 223 & n.28, *clarified*, 20 F.C.C.2d 741 (1969) (state or local regulations inconsistent with federal regulatory policies governing cablecasting are preempted); *Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971); *Report and Order in Docket No. 21002*, 66 F.C.C.2d 380, 402 n.21 (1977) (state and local authorities preempted

[24] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 178 (1974); *accord, Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975).

"from regulating rates, terms and conditions of pay and other video auxiliary services").[25] The Second Circuit upheld FCC preemption of state regulation of the rates for pay cable programming in *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).[26]

The Commission also has detailed rules regulating operation and signal carriage obligations of cable television systems. "All of these rules were adopted with a view toward assuring that the benefits of cable communications become a reality on a nationwide basis."[27] For example, "must-carry" rules require

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[25] *See also Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in Docket No. 21002*, 71 F.C.C.2d 569, 584 n.27. (1979) (noting federal preemption of rates, terms and conditions of video auxiliary services); *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975); *cf. First Report and Order in Docket No. 19554*, 52 F.C.C.2d 1, 68 (1975) (noting federal preemption of rates and content of subscription programming). "Pay" cable services include those specialized programming services for which a per-program or per-channel charge is made such as Home Box Office (HBO). "Other video auxilary services" include satellite-delivered cablecasting such as the USA Network and Cable News Network which are provided to a cable subscriber. At times these video auxiliary services are packaged together or "tiered" and offered for an extra charge in addition to the basic subscriber rate. The Commission has recently confirmed its preemption of state and local regulation of tiered service rates. *Community Cable TV, Inc.*, _____F.C.C.2d_____, FCC 83-525 (Nov. 15, 1983).

[26] Along with its preemption of cable programming, the Commission has also preempted state regulation of other areas affecting signal transmission. *See, e.g., Earth Satellite Communications, Inc.*, FCC Report No. 2812, Nov. 9, 1983 (state or local regulation of the reception of satellite-delivered signals by satellite master antenna television systems); *Memorandum Opinion and Order in The Second Computer Inquiry*, 84 F.C.C.2d 50, 70, 98 (1980) (operation of customer premises equipment, such as receive-only earth stations); *Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 479 (1974) (technical standards associated with generation of cable programming signals).

[27] *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 865 (1975). Although the Commission has enacted specific regulations governing a cable operator's carriage of television broadcast signals, it has thus far made optional the transmission of cablecast programming. *See First Report and Order in Docket No. 18397*, 20 F.C.C.2d 201, 205, 207-208 (1969); *see also Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 185-186, 199-

footnote continues

cable operators, under certain conditions, to carry the signals of particular television stations.[28]

When a cable system carries a television signal, either voluntarily or as a "must-carry" obligation, FCC regulations require carrying the signal in its entirety, without deletion or alteration of any part.[29] Both the regulatory history and Commission interpretation emphasize that this rule applies to conventional programs and to advertisements.[30]

2. The Copyright Act of 1976

Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. 111(c)(3), part of the statutory compulsory licensing system,[31]

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footnote continued

200, 202 (1974). This does not effect the FCC's preemption of regulation of cable programming. "Federal regulation need not be heavy-handed in order to preempt state regulation." *New York State Comm'n on Cable Television v. F.C.C.*, 669 F.2d 58, 66 (2d Cir. 1982); *accord, Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2109 (1983); *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-172, 178 (1978); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

[28] *See* 47 C.F.R. §§ 76.57-.61 (1982). Cable operators in "major" and "smaller" television markets are required to carry, *inter alia*, the broadcast signal of a television station if the cable system is within the "specified zone" (i.e., 35 miles) of the television station or if the station is "significantly viewed" in the community in which the cable system operates. *Id.* § 76.59(a)(1),(6) and §§ 76.61(a)(1),(5). In certain cases where a cable system is located near state boundaries, these mandatory rules often require a cable operator to carry broadcast signals emanating from a neighboring state. *See* JA at 21-23, 35-36.

[29] 47 C.F.R. § 76.55(b) (1983). FCC rules not pertinent here require deletion of certain live sports and duplicating network programming.

[30] *See Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978); *WAPA-TV Broadcasting Corp.*, 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 F.C.C.2d 417, 444 (1968); *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 753, 756 (1966).

[31] Section 111 of the Copyright Act provides cable operators with a limited blanket license to retransmit copyrighted material contained in television broadcast signals if the operator complies with FCC signal carriage rules and copyright reporting requirements and makes periodic royalty payments. The compulsory copyright license for cable operators was created by Congress because it was deemed infeasible for cable systems that carry the signals of numerous television stations to attempt to negotiate individual agreements with each of many different copyright owners for the right to carry every program broadcast by each station. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5703.

prohibits cable systems' willful deletion or alteration of advertisements from a television signal.[32] The legislative history of this provision demonstrates Congress' intent to create a nationwide scheme of compulsory licensing to accommodate the rights of copyright owners, advertisers, and cable operators. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 93-94, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5707-08 (Tampering with advertisements harms "the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach."). Further, Congress recognized the complex problems affecting copyright issues and matters of communications policy,[33] and intended:

> Broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages. Included in the prohibition are commercial messages and station announcements not only during, but also immediately before or after the program, so as to insure a continuous ban on commercial substitution from one program to another.

Id. at 94. Accordingly, any willful deletion or alteration of advertisements by a cable system results in loss of the compulsory license, constitutes infringement, and subjects a cable operator to the civil and criminal penalties in the Copyright Act. *See* 17 U.S.C. 501, *et seq.*

B. The Federal and State Regulatory Schemes Are in Direct Conflict and Therefore Oklahoma's Liquor Advertising Ban is Invalid As Applied to Cable Programming

The direct conflict with federal law resulting from the application of Oklahoma's blanket advertising ban to carriage of cable programming is self-evident. Deletion of alcoholic

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[32] *See* PA at 53a.

[33] "[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules . . . adopted by the Federal Communications Commission . . . ." H.R. Rep. No. 1476, 94th Cong. 2d Sess. 89, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5703.

beverage advertising, even if it were technically feasible,[34] violates federal communications and copyright law. Deletion of the entire television signal, in certain situations, constitutes a violation of the FCC's "must carry" rules.[35] Deletion of other out-of-state signals, including national cablecasting program services, blocks accomplishment of the Commission's long-standing regulatory goals to increase the public's choice of program services, to provide diversified programming to each of the several states and communities, and to integrate cable television into the national communications system.[36]

Where, as here, there is a direct conflict between state and federal law, this Court has articulated guidelines[37] for deciding when the state law must fall:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is

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[34] The District Court found that there is "no feasible way for [Petitioners] to block out the advertisements." PA at 4la; *see also* JA at 26, 29, 39; *Cable Television Report and Order*, 36 F.C.C.2d 143, 165 (1972) (proposal to allow commercial substitution by cable operators rejected by FCC as unworkable).

[35] The testimony at the preliminary injunction hearing was that some Oklahoma cable operators are required to carry out-of-state signals which often contain wine advertisements. JA at 22, 35.

[36] This Court has confirmed these regulatory goals. *See F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 666-669 (1972) (plurality opinion); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *see also Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2nd Cir. 1978), *cert. denied*, 441 U.S. 904 (1979). Deletion of all out-of-state cable programming would also, as the District Court found, "cause a large but inherently immeasurable reduction in [Petitioners'] subscriber revenue," PA at 42a, thereby jeopardizing the continued financial viability of the cable systems and the fulfillment of the FCC's statutory mandate.

[37] *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (federal law preempts state law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) (state provision void to the extent that it actually conflicts with a valid federal statute, regulation or policy); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (federal preemption inescapable and no inquiry

> whether both regulations can be enforced without impairing the federal superintendence of the field . . . .

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). Here, federal and state laws cannot both be enforced without drastically impairing the federal superintendence of the cable programming field.[38] Oklahoma's ban on alcoholic beverage advertising, as applied to cable television programming, must therefore give way.[39]

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footnote continued

into congressional design required "where compliance with both federal and state regulations is a physical impossibility"). *See also Perez v. Campbell*, 402 U.S. 637, 652 (1971) (court looks to the effect, rather than the purpose, of the state regulation); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (court considers "the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written").

These principles have been applied to support federal preemption when state regulation of communications services would interfere with the conduct or development of interstate communications or the achievement of a federal regulatory goal as identified by the FCC. *See, e.g., Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198, 214-217 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2109 (1983); *New York State Comm'n on Cable Television v. F.C.C.*, 669 F.2d 58 (2d Cir. 1982); *Brookhaven Cable TV, Inc. v. Kelley*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 525 F.2d 630, 646 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[38] The Oklahoma laws are not saved from preemption ____, because the federal objectives are expressed by an agency. Federal regulations and congressionally approved agency policy have no less preemptive effect than federal statutes. *See Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, ____ U.S. ____, 102, S.Ct. 3014, 3022 (1982).

[39] In *Dunagin v. City of Oxford*, ____ F.2d ____, No. 80-3762, slip op. at 487 (West Pub. Co. page proof) (5th Cir. October 31, 1983) (en banc), the court found it "exceedingly unlikely" that the State of Mississippi could ban all out-of-state cable signals containing liquor advertisements in the face of, *inter alia*, the Supremacy Clause.

III

OKLAHOMA'S LIQUOR ADVERTISING BAN AS APPLIED TO CABLE PROGRAMMING UNCONSTITUTIONALLY SUPPRESSES COMMERCIAL SPEECH AND OTHER CABLE PROGRAMMING AND IS THEREFORE INVALID

The Tenth Circuit misapplied the four part test established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), for evaluating commercial speech regulations. Additionally, it allowed a blanket ban on truthful, non-misleading advertising relating to lawful products and activities contrary to the decisions of this Court.[40] More important, however, the Tenth Circuit failed to apply established First Amendment tests in evaluating the effect of Oklahoma's regulations on cable programming other than wine advertisements.[41]

A. The Tenth Circuit Misapplied the Central Hudson Test

In *Central Hudson* this Court reconfirmed that commercial speech is entitled to First Amendment protection and that a state can regulate such speech only under narrowly defined

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[40] *Central Hudson*, 447 U.S. at 566 n.9; *see also In re R.M.J.*, 455 U.S. 191, 199 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976); *Bigelow v. Virginia*, 421 U.S. 807 (1975).

[41] Cable operators, like publishers and broadcasters, are entitled to protection from unreasonable governmental restraints on their speech by the First and Fourteenth Amendments. *See, e.g., Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1053-1057 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Similarly, the First Amendment protects the programming, including the advertising, carried by cable operators as well as the operators' editorial function in selecting the programming. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66-67 (1981); *Central Hudson*, 447 U.S. 557 (1980).

circumstances. The Court established a four part test to assess the validity of restrictions on commercial speech.[42]

Both lower courts applied the *Central Hudson* analysis and concluded that the wine commercials retransmitted by Petitioners concerned lawful activity and were not misleading and that the state had a substantial interest in controlling the intemperance of its population.[43] The Tenth Circuit, however, misapplied the *Central Hudson* analysis in answering the questions whether the advertising ban directly advances Oklahoma's asserted interest in temperance and whether the regulation is more extensive than necessary to serve that interest.

1. The State Failed To Prove That Its Liquor Advertising Ban As Applied To Cable Programming Directly Advances Its Interest In The Temperance Of Its Population

Just last term this Court held that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, ____ U.S. ____, 103 S.Ct. 2875, 2882 n.20 (1983); *see also Central Hudson*, 447 U.S. at 570. The District Court found that "[t]here is no evidence before the Court that Oklahoma's ban on advertising is a direct means of preventing alcohol abuse or protecting the health, safety, or welfare of Oklahomans." PA at

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[42] The Court articulated this test as follows:

> At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, 447 U.S. at 563.

[43] 699 F.2d at 500; PA at 19a-20a, 47a-48a. The Tenth Circuit specifically rejected the state's belated assertion that the advertising at issue is false or misleading and that it concerns unlawful activity. 699 F.2d at 499-500 & nn.7-9; PA at 17a-18a & n.7, 20a & nn.8-9. Both the District Court and the Tenth Circuit held that Petitioners' speech interests were protected by the First and Fourteenth Amendments. 669 F.2d at 500; PA at 17a, 42a.

48a. Nevertheless the Tenth Circuit held, as a matter of law, that Oklahoma's blanket ban satisfies the third part of the *Central Hudson* test.[44]

A regulation suppressing commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. In *Bolger* this Court struck down a federal statute that completely prohibited the mailing of unsolicited advertisements for contraceptives. The statutory prohibition failed as a means of effectuating the government's interest under the third part of the *Central Hudson* test. *Bolger*, ____ U.S. ____, 103 S.Ct. at 2884. This Court found that the statute "provides only the most limited incremental support for the [governmental] interest asserted." *Id.* at 2884. That conclusion followed from a recognition that children are already exposed to the subject of contraception via magazine advertisements, publications and sex education courses. As a result, only a "marginal degree of protection" would be achieved by a ban on the unsolicited material. *Id.*

Similarly, in this case, both lower courts recognized that alcoholic beverage advertisements in out-of-state newspapers, magazines and broadcasts are available throughout Oklahoma. 699 F.2d at 493 n.1, 502; PA at 5a n.1, 23a-24a, 45a, 48a. Residents of Oklahoma are exposed to beer advertisements from in-state sources and to a variety of liquor advertisements from sources outside the state, so a cable television advertising ban can have but a minimal effect on liquor sales and consumption.[45] Rather than directly advancing the state's interest, the ban provides "only the most limited incremental support" and a "marginal degree of protection" for that interest. *Bolger*, ____ U.S. at ____, 103 S.Ct. at 2884.

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[44] 699 F.2d at 501; PA at 22a. In relieving the State of its burden of proving a direct relationship between its asserted interest and the advertising ban, the Tenth Circuit relied heavily on the state's power under the Twenty-first Amendment. 699 F.2d at 501; PA at 22a. Reliance on the Twenty-first Amendment to validate a regulation that otherwise would not pass scrutiny under *Central Hudson* is inconsistent with this Court's prior decisions. *See* Part II, pages 11-15, *supra*.

[45] The failure of the state to enforce the advertising ban against national newspapers and magazines or to include within the ban other beverages

footnote continues

Likewise, because the "consumption of alcoholic beverages in Oklahoma has increased substantially in the last twenty years despite the ban on advertising of such beverages," PA at 48a, it is difficult to justify the prohibition on the ground that it promotes temperance. Under such circumstances, deference to legislative conclusions concerning the effectiveness of an advertising ban is not proper. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-114 (1980); *Craig v. Boren*, 429 U.S. 190, 200-204 (1976). Consequently, in light of the unsubstantiated state concerns put forward in this case, the Tenth Circuit erred in holding, as a matter of law, that Oklahoma's advertising ban directly advances the state's interest in temperance.

2. Oklahoma's Liquor Advertising Ban Is Far More Extensive Than Necessary To Protect The State's Interest In The Temperance Of Its Population

The District Court found that the advertising ban as applied to Petitioners "is a total prohibition of the dissemination of all information on the subject of alcoholic beverages," that the state had not tried "[a] means less restrictive than blanket suppression," and that the state had not clearly shown "that an absolute prohibition of [liquor] advertising is the only solution." PA at 49a. The court concluded that "the State's attempted regulation [of liquor advertising] is more extensive than necessary to serve the State's interest." *Id.* The Tenth Circuit nevertheless held that the advertising ban is not more extensive than necessary to serve the state's interest. 699 F.2d at 502; PA at 23a-24a. In so holding, the Tenth Circuit once again relieved the state of its burden of justifying the restrictions on Petitioners' commercial speech contrary to this Court's decisions. *See, e.g., Bolger*, ____ U.S. ____, 103 S.Ct. at 2882 n.20; *In re R.M.J.*, 455 U.S. 191,

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containing alcohol (*i.e.*, beer) significantly undermines the plausibility of the state's concern that advertising increases intemperance. Furthermore, the state's failure to enforce the advertising ban against cable operators until now substantially minimizes its contention that wine advertisements on cable television foster the inherent problems that justify their exclusion. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 73 n.14 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530-533 (1981) (Brennan, J., concurring in judgment).

206-207 (1982); *Central Hudson*, 447 U.S. at 570; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977).[46]

Contrary to this Court's holding in *Central Hudson*, the Tenth Circuit completely failed to assess the regulations' impact on Petitioners' cable programming other than wine advertisements.[47] In *Bolger* this Court affirmed that a law regulating a commercial activity "must be examined carefully to ensure that

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[46] It is not clear from the record that a more selective approach to regulating alcohol abuse would fail to address the distinctive problems confronting the state (*i.e.*, the health and welfare of its residents, the safety of its highways). Oklahoma has not prohibited the importation or sale of alcoholic beverages within its borders. Such a prohibition would be less restrictive to First Amendment rights than restrictions on advertising or other cable programming. Alternatively, if the state desired to reduce liquor consumption, it could raise taxes on liquor purchases or reduce the hours that liquor retailers may operate and thereby discourage sales; it could step up enforcement of its drunk driving and public intoxication laws; and it could require that a warning of potential health hazards similar to the one now used for cigarettes be placed on each bottle of liquor sold in the state. These alternative measures accomplish the same result (*i.e.*, reduce liquor consumption) and are substantially less intrusive on Petitioners' First Amendment rights. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (state could enforce littering ordinance rather than banning distribution of leaflets).

[47] The Tenth Circuit's holding was based, in part, on the conclusion that Petitioners are free to carry other forms of advertising and that Oklahoma has not eliminated the dissemination of all information concerning alcoholic beverages. 699 F.2d at 502; PA at 23a-24a. These factors are irrelevant. *See Central Hudson*, 447 U.S. at 558-560 (state advertising regulation invalidated despite allowing utility to advertise non-energy related information); *see also In re R.M.J.*, 455 U.S. 191, 193-194 (1982) (advertising ban invalidated despite allowing attorney to advertise some information); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93-95 (1977) (municipal ordinance invalidated despite homeowners having alternative methods of communicating information). Moreover, the state cannot abridge Petitioners' First Amendment rights on the grounds that such rights may be exercised on other non-alcohol related subjects or that other persons are still entitled to speak on the subject. *See Central Hudson*, 447 U.S. at 558-560 (state regulation invalidated although it did not prohibit oil dealers from promoting the sale of energy); *cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (freedom of expression cannot be abridged on plea that it may be exercised in some other place); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541 n.10 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976).

speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger*, ____ U.S. ____, 103 S.Ct. at 2880. In analyzing whether the regulation in *Central Hudson* was no more extensive than necessary to serve the state's interest, this Court held that to the extent the state's regulation "suppresses speech that in no way impairs the State's interest," the regulation "violates the First and Fourteenth Amendments and must be invalidated." *Central Hudson*, 447 U.S. at 570; *see also* 447 U.S. at 565 & n.8.

Deletion of wine advertisements from Petitioners' out-of-state cable programming is neither economically nor technically feasible and, as to television signals, violates federal law. PA at 29a, 41a; JA at 23-26, 28-29, 39. Consequently, if Petitioners are required to delete wine commercials from imported cable programming, they will be compelled to discontinue carriage of the entire signal even though it includes an abundance of political and artistic expression and commercial messages for products and services other than alcoholic beverages.[48] The advertising ban is far broader than necessary to protect the state's interest because this programming poses no danger to the state's interest in controlling alcohol abuse within its borders.[49]

B. Oklahoma's Liquor Advertising Regulation Impermissibly Burdens Cable Programming Other than Wine Advertisements

The Tenth Circuit's failure to consider the impact of Oklahoma's regulation on all out-of-state cable programming

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[48] In some cases cable operators required to carry out-of-state broadcast television programming will be forced to cease operations to avoid a violation of the FCC's "must-carry" rules. In other cases cable operators who are no longer able to carry out-of-state cable programming will lose subscribers and will suffer severe, if not fatal, economic losses. *See* JA at 22, 37. More importantly, for those cable operators able to stay in business, the advertising ban will have a "chilling effect" on their future program selection because they will not add new programming services for fear that such services may at some time include liquor advertisements. Such an impact on protected speech is not permitted by this Court's First Amendment decisions. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 278-279 (1964); *Smith v. California*, 361 U.S. 147, 150-151 (1959).

[49] *Central Hudson*, 447 U.S. at 565, 570.

that Petitioners bring into the state is a fatal flaw in its decision quite apart from its misinterpretation of *Central Hudson's* analysis of commercial speech. Petitioners have already demonstrated, and the District Court noted, the practical impossibility of cable operators' monitoring incoming cable programming in an attempt to delete alcoholic beverage commercials. The District Court also found as fact that constant monitoring would entail an enormous financial burden. PA at 29a. These constraints exist independently of FCC and Copyright Act prohibitions against signal alteration. Consequently, Oklahoma's statutory scheme, if upheld, would force cable operators to refrain from carrying various out-of-state cable programming that contains an abundance of political and artistic expression, and a wide variety of commercial messages for products and services other than alcoholic beverages, all protected under the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); *see First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Craig v. Boren*, 429 U.S. 190, 206 (1976).

Oklahoma faces an extremely heavy burden in justifying a ban on out-of-state cable programming because of the occasional inclusion of wine advertisements. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569-570 (1976). For example, no state interest yet identified under the Twenty-first Amendment would compare to the kind of national security interest that might, under appropriate circumstances, justify a temporary ban on cable programming under *New York Times Co. v. United States*, 403 U.S. 713 (1971).

A permanent ban on out-of-state cable programming, the practical issue here, would require a state interest of overwhelming magnitude. In the language of *Shelton v. Tucker*, 364 U.S. 479 (1960):

> The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with [First Amendment] freedom goes far beyond what might be justified in the exercise of the State's legitimate [interest under the Twenty-first Amendment].

364 U.S. at 490. The inevitable overinclusive effect of the Oklahoma regulations is fatal. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 794-95.

This Court in *Schad* reaffirmed that governmental regulation of protected expression must leave open adequate alternative channels of communication. Despite the Borough's assertion that the nude dancing at issue in that case was amply available elsewhere, this Court rejected the contention that a ban on such dancing in the Borough itself was permissible. *Schad*, 452 U.S. at 76-77. Similarly, the availability on Oklahoma cable systems of television stations licensed within that state fails to compensate for Oklahoma's preventing, for all practical purposes, the cable importation of out-of-state programming. Such constriction of available sources of political, cultural and commercial information in the operation of cable systems cannot survive as an " 'incidental' restriction" on expression under *United States v. O'Brien*, 391 U.S. 367, 377 (1968), or as a narrowly drawn regulation of commercial speech within the framework of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Oklahoma's sweeping prohibition of the wide range of expression available on cable programming, simply to avoid messages about alcoholic beverages, far exceeds the range of governmental choice as to commercial speech restrictions that are, in theory, permitted. *Id.* at 512-16. The Oklahoma statutes actually present the question of a flat ban on out-of-state cable programming in a particular medium. While the Court declined to consider the billboard restrictions in *Metromedia* as a flat ban, 453 U.S. at 515 n.20, Justice Brennan, in his concurring opinion, concentrated on the practical effects of the billboard ordinance, perceived a flat ban and condemned it. *Id.* at 525-26. The Oklahoma scheme is unconstitutional under either approach.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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